indictment, he could not evoke from federal appellate courts a ruling as to the res judicata effect of such acquittal upon a later indictment unless and until he was convicted thereunder. For a denial by the district court of a motion to dismiss the second indictment upon that ground would not be an appealable order.

No public interest and no genuine interest of petitioner will be served by continuing the present proceedings. He will have to undergo the burden of a trial on the new indictment whether the first indictment is dismissed voluntarily by the Government or on the merits by order of this Court, or whether this Court directs an acquittal. We therefore respectfully submit that the Government's motion for leave to apply to the District Court for leave to dismiss the indictment should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and Rule involved	2
Statement	3
Argument	9
Conclusion	23

CITATIONS

Cases:	
Berwick's Case, Foster, *Crown Law*, pp. 10, 243, 18 How. St. Trials 367 (1746)	19
Bersio v. *United States*, 124 F. 2d 310, certiorari denied, 316 U. S. 665	17
Bryan v. *United States*, 338 U. S. 552	20
Coleman v. *McGrath*, No. 264, this Term	20
Commonwealth v. *Miles*, 140 Ky. 577 (1910)	21
Commonwealth v. *Woodward*, 157 Mass. 516 (1893)	11
Glasser v. *United States*, 315 U. S. 60	17
Hagner v. *United States*, 285 U. S. 427	17
People v. *McKinney*, 3 Park. Crim. Rep. (N. Y.) 510 (1857)	21
Regina v. *Schlesinger*, 10 Q. B. 670, 2 Cox, Cr. Cases 200 (1847)	21
State v. *Cruikshank*, 6 Blackford (Ind.) 62 (1841)	21
State v. *Gates*, 17 N. H. 373 (1845)	21
United States v. *Belvin*, 46 Fed. 381	11
United States v. *Goldsmith*, 108 F. 2d 917, certiorari denied, 309 U. S. 678	17
United States ex rel. Mc Cann v. *Thompson*, 144 F. 2d 604, certiorari denied, 323 U. S. 790	11
United States v. *Williams*, 1 Dill. 485, Fed. Cas. No. 16,716	11
Statutes:	
Perjury Act of 1911 (1 and 2 George V, c. 6)	21
18 U. S. C. 1621	2, 21
Miscellaneous:	
Federal Rules of Criminal Procedure, Rule 6 (b) (2)	3, 11
Hawkins, *Pleas of Crown* (6th edition, 1777), Bk. I, Ch. 69, Sec. 6, pp. 322–333	21

982412—52——1

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 191 F. 2d 246.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1951. On September 20, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to October 20, 1951. The petition was filed October 19, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

DARK PAGE BLEEDTHRU

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly left for further hearing and determination in the District Court the issue of whether the alleged interest of the foreman of the grand jury in the prosecution so tainted the action of the grand jury as a whole as to invalidate the indictment.

2. Whether the indictment was sufficient to charge an offense.

3. Whether proof of acts consistent only with membership in the Communist Party is direct evidence sufficient to sustain a conviction for perjury based on denial of such membership.

4. Whether in a prosecution for perjury it is sufficient to prove that the defendant did not believe the statements to which he swore.

STATUTE AND RULE INVOLVED

18 U. S. C. 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000

or imprisoned not more than five years, or both.

Rule 6 (b) (2) of the Federal Rules of Criminal Procedure provides:

> A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

STATEMENT

Petitioner was indicted for perjury in the United States District Court for the Southern District of New York, in that, when testifying under oath before a grand jury in that district, he stated that he had never been a member of the Communist Party, testimony which he then well knew and believed to be untrue (Tr. XVIII–XIX).[1]

The giving of the testimony is admitted and its materiality is not substantially controverted. The chief issue at the trial was whether petitioner

[1] References are to the typewritten transcript on file in this cause.

"well knew and believed" his answer as to membership in the Communist Party to be false. On that issue the salient evidence for the Government may be summarized as follows.

In the fall of 1936, petitioner secured a leave of absence from Dartmouth College and obtained employment as a messenger for the Tennessee Valley Authority at Knoxville, Tennessee (Tr. 2429–2430, 2390). In the middle of June 1937, one McConnell, who used the name Ken Malcombre, was assigned to Knoxville as a full-time organizer for the Communist Party (Tr. 580–583). He testified that shortly after his arrival in Knoxville, he called a meeting of the Communist Party there, to be held at night in a park, to discuss the shortcomings and problems of the local Party. Petitioner attended and suggested the publishing of a leaflet to indicate activity. (Tr. 586–587.) Subsequently, at a meeting of the Workers Alliance, an organization of unemployed and WPA workers, petitioner pointed out to McConnell persons whom he considered to be potential recruits for the Party (Tr. 589–591). McConnell testified that his relationships with petitioner were all as "fellow members of the Communist Party" (Tr. 684–685).

McConnell's former wife, known as Betty Malcolm, obtained employment with the Tennessee Valley Authority (Tr. 584, 684). She presided at meetings, held at her house, of a unit of the Communist Party composed of members employed by

the Tennessee Valley Authority (Tr. 465–466, 571). Four to six persons usually attended such meetings (Tr. 468, 705). Two different witnesses testified that petitioner was one of those in attendance at such Communist Party unit meetings (Tr. 468–469, 692–693). The meetings were concerned with liberal and labor activities in the community, methods of enlarging Party membership, and the desirability of holding an open meeting of the Communist Party (Tr. 468, 693). Petitioner took an active and vigorous part in the discussions (Tr. 694).

In the spring of 1937, petitioner endeavored to persuade a TVA employee, who had been active in a group known as the Workers Education Committee, to join the Communist Party (Tr. 3413–3414, 3416–3417).[2]

The official post office box of the Communist Party in Knoxville was Post Office Box No.

[2] Martin, a witness for the defense, who knew petitioner at Knoxville (Tr. 2212), admitted that, in 1941, in a sworn statement to the Civil Service Commission (Tr. 2231–2232) he had stated, when asked about his association with petitioner (Tr. 2238)—

"I won't deny that he was a Communist as that was well known, because he approached everyone and asked them to join the Communist Party" (Tr. 2239). The witness testified that he thought the statement "substantially correct," but the language "loose" since he did not know whether petitioner was a Communist. He stated that he had no present recollection that petitioner approached anyone to join the Party, although he did "not deny" that he may have "recalled at that time some incident of that sort." Tr. 2244–2245.)

1692 (Tr. 843–844, 850). The Party had a strict rule that only Party members were to use such boxes (Tr. 924). While in Knoxville, petitioner received at this box the official publication of the Communist Party for the South (Tr. 839–840). When he left Knoxville, he had his subscription transferred (Tr. 841).

In the fall of 1937, petitioner returned to Dartmouth as a junior (Tr. 2496). At a peace meeting there he met Ann Moos, whom he later married in his senior year (Tr. 180). Before his engagement, petitioner described his activities in Knoxville and, after binding Miss Moos to secrecy, told her that he had been a member of the Communist Party down there (Tr. 184). Before his wife married him, he promised her that he would continue to be a Communist (Tr. 202). A fellow student at Dartmouth testified that petitioner told him "that he was a member of the Communist Party because his father had always been a stooge for capitalists" (Tr. 1432).[3]

In 1939, petitioner and his wife lived in New York where petitioner was doing graduate work in economics at Columbia University (Tr. 2513). They met and became friendly with Joe North, a writer for and subsequently editor of the New

[3] There was testimony that at Dartmouth petitioner was active in the Young Communist League (Tr. 186, 983), but the judge ruled that such testimony was not probative on the issue of petitioner's membership in the Communist Party (Tr. 4017).

Masses (Tr. 194, 207, 216). They did not attend Party meetings in this period, but they did solicit votes for Earl Browder and contributed money to the New Masses (Tr. 215–217, 313).

In the spring of 1940, petitioner entered the Government service in Washington (Tr. 2538–2539). At first he worked for the National Resources Planning Board, later for the Office of Price Administration, and after February 1942, for the War Production Board (Tr. 2547). Petitioner and his wife saw Joe North fairly regularly and gave him information that they thought might be useful (Tr. 229–230). They paid Party dues to him sporadically (Tr. 396, 409–411).

In November 1941, petitioner and his wife moved to Alexandria, Va. (Tr. 228). They mentioned to Joe North that they felt out of touch with Party work and wanted to do more without joining a local group (Tr. 228–229, 384). They were finding it difficult to make contact with North, who did not come to Washington frequently (Tr. 230–231). North said that he would discuss the matter with Party headquarters and see if he could arrange another contact (Tr. 231).

Early in 1942, North introduced petitioner and his wife to "John" (Tr. 231–232), who was in fact Jacob Golos, a top official of the Communist Party underground (Tr. 233, 1052–1054, 1056). Subsequently, John introduced the Remingtons to "Helen", who was in fact Elizabeth Bentley

(Tr. 235–236, 1060). The Remingtons were told that Helen would be in Washington at approximately two-week intervals to receive any information they had for her, and would bring them Communist Party literature. They were also told to pay Party dues to her. (Tr. 237, 388, 1063–1064.)

In accordance with these arrangements, Miss Bentley came to Washington from time to time and had a number of meetings with petitioner from 1942 to 1944, at some of which petitioner's wife was also present. These meetings took place in petitioner's car, on park benches, in luncheonettes, and other unobtrusive places. (Tr. 239–243, 245, 1066–1069.)

Petitioner delivered to Miss Bentley various items of information which he obtained through his work, including statistics as to airplane production, allocation of planes to the several theatres of war and estimates of their performance in battle (Tr. 1073–1075). At one time when petitioner's wife was present, he gave Miss Bentley information that he said was very important and top secret (Tr. 243, 1077). This was a formula for the conversion of garbage to gasoline or rubber (Tr. 243, 1077–1078), which was at one time seriously considered but which subsequently proved unfeasible (Tr. 3274, 3282). Remington also told Miss Bentley that one Redmont, whom he knew to be a Communist Party member,

needed a contact and asked whether she would take him on (Tr. 1081). Later Remington introduced Redmont to Miss Bentley and Golos (Tr. 1082–1083).

At petitioner's first meeting with Miss Bentley in Washington, petitioner's wife was present, and gave him $20 which he, in turn, gave to Miss Bentley as dues (Tr. 241, 395). This procedure was repeated on other occasions when petitioner's wife accompanied him to his meetings with Miss Bentley (Tr. 242–243, 397, 1070). The wife testified that she was very anxious to pay dues because she felt that such payment was an indication that they were bona fide members of the Party (Tr. 389–391).

Miss Bentley testified that petitioner also paid dues to her when his wife was not present (Tr. 1239). She brought down the schedule of rates and left it to the individual to calculate his own dues (Tr. 242, 1071, 1239). After dues had been paid, Miss Bentley would, at a later meeting, deliver a receipt for the money which had been prepared at Communist Party headquarters (Tr. 1072, 1241, 1248). The receipts were made out "to a friend" and initialed illegibly (Tr. 1241). Miss Bentley testified that persons doing underground work were never given Party membership books (Tr. 1087).[4]

[4] The evidence with respect to the relationship between Miss Bentley and grand juror Brunini is summarized in Point I, *infra*.

Petitioner was found guilty (Tr. 4027) and sentenced to imprisonment for five years and to pay a fine of $2,000 (Tr. 4041).

On appeal, the Court of Appeals for the Second Circuit reversed the conviction and remanded the cause because of various trial errors, including the failure of the trial judge, in his charge to the jury, adequately to define membership in the Communist Party, or to point out to the jury the type of overt acts which would show that petitioner believed himself to be a member. 191 F. 2d 246.

ARGUMENT

Petitioner seeks review here of a judgment reversing his conviction. Manifestly, consideration of the issues raised in the petition is warranted only if he can show that he is entitled to greater relief than he already has been given under the judgment below. He therefore seeks *either* a direction of a judgment of acquittal or dismissal of the indictment. We submit that he has shown no grounds for such relief.

I

Petitioner's contention that the indictment should be dismissed because the foreman of the grand jury, Brunini, allegedly had a financial interest in the book Miss Bentley was to publish and that such financial interest would be furthered by petitioner's conviction, with the result that he improperly influenced the grand jury to return the indictment (Pet. 9–27), does not

present a matter which is ripe for review by this Court at this time. The Court of Appeals did not reject petitioner's theory on this point, but gave petitioner an opportunity to prove his assertions by according him access to the grand jury minutes of his own testimony, which would seem to be the portion of the grand jury proceedings principally involved. The Court of Appeals stated that "The indictment should not be quashed unless undue influence is shown," and that "Since we have already held that the accused must be given access to the minutes of his own testimony before the grand jury, it will appear upon inspection whether Brunini [the foreman] abused his powers, at least in that part of the proceedings" (Pet. xiii).[5]

Rule 6 (b) (2) of the Federal Rules of Criminal Procedure, *supra*, p. 3, specifically provides that the disqualification of one member shall not result in dismissal of an indictment if twelve qualified jurors voted for the indictment. This seems clearly to mean that the mere presence of an interested person on a grand jury will not vitiate the indictment, so long as it is voted by the required number of disinterested persons. *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604, 606 (C. A. 2), certiorari denied, 323 U. S. 790 (five allegedly interested jurors among

[5] The court's reference was to its previous holding (*id.*) that the trial court erred in denying petitioner's motion to inspect the minutes of his testimony before the grand jury.

seventeen returning indictment). Under this Rule, Brunini's collaboration with Miss Bentley on her book (which is not denied)[6] or his financial interest in it (as to which the testimony was in conflict) might have disqualified him, but would not have invalidated the indictment.

The court below concluded, however, and we do not challenge its ruling, that if it could be shown that the foreman so influenced the other jurors that the whole jury could be said to be tainted, the indictment would have to be dismissed. Thus, the court below did not hold that the indictment would be valid despite the allegations as to Brunini's conduct. It held merely that the matter should be determined if there was to be a retrial—and petitioner cannot be convicted under this indictment unless there is a retrial—upon the basis of a more complete exploration of the facts. This obviously is the kind of question—whether further evidence should be taken—upon which this Court will not ordinarily reverse, or review, the exercise of discretion by a lower court.

---

[6] It has been held that the fact that a grand juror had individual knowledge of a case, or even that he was a complainant, would not disqualify him. *Commonwealth* v. *Woodward*, 157 Mass. 516 (1893); *United States* v. *Williams*, 1 Dill. 485, Fed. Cas. No. 16,716 (C. C. D. Minn., 1871); *United States* v. *Belvin*, 46 Fed. 381 (C. C. E. D. Va., 1891). But even assuming individual disqualification, it follows *a fortiori* that the presence of such a juror does not invalidate the action of the grand jury as a whole, as was held in the *Thompson* case, *supra*.

In this case it was not an abuse of discretion for the Court of Appeals, in setting aside the conviction, to have concluded that the taking of additional testimony on this question would be appropriate if the case were to be retried. For not only was there a conflict in the testimony as to whether Brunini had a financial interest; there was nothing in the record at all to show he had influenced the other grand jurors.

First, there is the issue as to whether Brunini did have a financial interest in the book. At the trial, the defense cross-examined Miss Bentley, who testified that Brunini had given her moral and editorial support but denied that he had any financial interest in the book (Tr. 1377–1380). The defense then called two former employees of the publisher who testified that an earlier agreement with the publisher under which Brunini was to be Miss Bentley's literary assistant and receive part of the proceeds had been prepared (Tr. 1598–1600; 1537–1546). They did not know whether this earlier contract had been signed (Tr. 1546, 1610). Certainly an appellate tribunal cannot determine upon the basis of this possibly conflicting testimony that Brunini did have a financial interest. Brunini was not called upon to testify, nor were the publishers, although two of them were in the courtroom, one under subpoena by petitioner (Tr. 1585–1587); the burden was upon petitioner to establish his point,

and his failure to call available witnesses who would have direct knowledge is significant. More extensive hearings and findings to determine this initial question are certainly appropriate, if not necessary, to establishment of the premise of petitioner's position.

And even if a financial interest in the book can be shown, there would still be a question as to whether this would give Brunini such a financial interest in the prosecution of petitioner as to constitute a disqualification of his right to act as a juror. Manifestly, that is a matter which requires further examination and determination.

And then there would still remain the ultimate question of whether any taint that might possibly be found as to Brunini extended to the other grand jurors. There was no evidence as to this at all. It cannot be assumed without proof that one grand juror improperly influenced the others voting for the indictment.[7] This subject even more clearly requires further exploration. Petitioner asserts that he was prevented by the District Court from ascertaining what went on inside the grand jury room. But certainly the failure of petitioner to prove his claim, even for

[7] The United States Attorney asserted that there were 22 jurors who voted for the indictment (Tr. 1405, 2664); defendant objected to this statement on the ground that the grand jury records had not been disclosed. This subject is obviously one which should be explored more fully in order to determine whether 12 qualified and uninfluenced jurors had voted for the indictment.

such an excusable reason, would not warrant dismissal of the indictment; he would at most be entitled to a fresh hearing on the question. Thus, even if it be assumed that petitioner was improperly barred by the District Court from inquiring into facts needed to support his allegations and his affidavit, this would not prove error in the Court of Appeals, which set aside the District Court's decision, opened up the closed sources in an important respect, and gave petitioner a chance to prove his claim.

All these matters could be fully heard and determined in the District Court if there were to be a new trial on the instant indictment. The court below certainly cannot be said to have acted improperly in not deciding the question in favor of petitioner on the basis of the present record, but in permitting the matter to be explored more fully on any retrial that might be held. We submit that it would be just as inappropriate for this Court to attempt to decide these questions on the basis of the present record.

Petitioner's aspersions on the attorneys who prosecuted the case for the Government are wholly unwarranted. Mr. Donegan, who assisted in presenting the case before the grand jury, stated to the court that Miss Bentley, whom he had not previously met, came to him as a client when he was engaged in private practice. As soon as it appeared that he might be asked to return to Government service as a special prose-

cutor, he told her that he wished to be relieved because of the possibility that she might be called as a witness, and he informed the grand jury of his former representation of Miss Bentley. (Tr. 1390–1391; 1521–1524.) Such conduct, which was in no way improper, certainly cannot affect the validity of the indictment.

Petitioner asserts that Government counsel acted improperly in not apprising him of their knowledge of the Brunini episode, and complains that this knowledge extended to the alleged financial relationship. But petitioner cannot impute to Government counsel knowledge of a fact not proved to be true. The fact that the episode may have been discussed in Department of Justice files, with the Attorney General, or with other judges, does not establish the truth of petitioner's allegations, and certainly does not establish that there was also an obligation to disclose anything to the adverse party. In view of the charge of impropriety, not supported in the record, we think it proper to state that the United States Attorney's office has advised us that on the basis of its inquiries, it remains of the opinion that at no time did Brunini have a financial interest in the book.[8] At most, Government counsel

[8] Since petitioner is of a contrary opinion and since the record furnishes no conclusive answer, we do not assert this to be a fact. But the difference of opinion and the conflict in the testimony shows how reasonable it was for the court below not to have determined the matter on the basis of the present record but to have left it open for a new hearing on conditions more favorable to petitioner.

learned some weeks after the indictment—and not before—that Brunini had collaborated with Bentley on her book. Since this would at most have disqualified him, without affecting the indictment voted by more than 12 other grand jurors, it would not have invalidated the indictment or in any other relevant manner have affected the case. It was thus in no way improper for the United States Attorney not to have disclosed the information to defense counsel or to the trial court.

II

A. Petitioner's challenge to the sufficiency of the indictment to state an offense (Pet. 28–31) is without merit. The indictment alleged clearly and definitely that petitioner had, at a certain time and place, in answer to a material question, sworn that he had never been a member of the Communist Party, a statement which he well knew and believed to be untrue. Manifestly, petitioner was informed of the offense for which he was to be tried and, if acquitted, could not again be tried for making that same statement at the same time and place. The indictment therefore meets the tests by which its validity must be judged; it informs petitioner of the nature of the offense and bars future prosecution for the same charge. *Glasser* v. *United States,* 315 U. S. 60, 66; *Hagner* v. *United States,* 285 U. S. 427, 431; *Bersio* v. *United States,* 124 F. 2d

310, 314 (C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. 2d 917, 920–921 (C. A. 2), certiorari denied, 309 U. S. 678.

All that the decision below held was that, in view of the manner in which the Government would presumably undertake to prove its case on a new trial, petitioner should be given a bill of particulars specifying the acts on which the Government intended to rely as proof of belief in membership. But it does not follow from that ruling that the indictment failed to inform petitioner of the offense for which he was to be tried. The court was merely extending to petitioner the advantage of requiring the Government to specify its evidence in advance.

Petitioner did not claim that at the time he denied membership before the grand jury or at the trial he did not know what was meant by the question. It may be that he did not know the kind of evidence upon which the Government would rely to prove the falsity of his oath, but lack of such knowledge is clearly very different from lack of knowledge as to the offense charged.

III

In urging that he is entitled to a judgment of acquittal, petitioner argues (Pet. 31–39) that the failure by the court below to direct the entry of such a judgment stems from its concept of the crime of perjury as embracing lack of belief in the statements on which the indictment is

founded, and that, if that concept is held to be erroneous, a judgment of acquittal must necessarily follow. This stems from his theory that the rule requiring "direct" evidence of at least one witness in perjury cases can, if the issue be objective falsity, be satisfied in this case only by proof of the initial act of joining.

We submit, however, that whether the issue to be proved is that petitioner was a member or that he believed himself to be a member of the Communist Party, proof of conduct consistent only with membership—although not of the act of joining—is direct proof sufficient to satisfy the perjury rule. For direct testimony is testimony which in and of itself has a rationally direct and compelling tendency to establish the facts to be proved. The evidence in this case was clearly sufficient on any theory to warrant submission of the case to the jury and thus to preclude the judgment of acquittal which petitioner seeks. The case, therefore, is not one in which this Court need decide the question raised by petitioner.

The Government proved, by more than two witnesses, that petitioner attended closed Communist Party meetings and participated therein on an equality with other members in discussion of Communist Party affairs. This is as much direct evidence, both of membership and belief in membership, as the act of filling out an application form.

Mere attendance at one or two meetings conceivably might not be considered sufficiently direct since conceivably an outsider might be allowed to attend a closed meeting. But repeated presence at meetings limited to members and participation therein as a member is clearly action evincing membership and therefore the direct evidence needed to satisfy the perjury rule. Cf. *Berwick's Case,* Foster, *Crown Law,* p. 10, 18 How. St. Trials 367 (1746), where testimony that, after a rebel garrison had surrendered, the defendant appeared in the prison set aside for officers and gave his rank, was held to be, not a mere confession after the fact, but an act constituting direct evidence of treason. (See subsequent comment thereon, Foster, *Crown Law,* pp. 243–244.)

Similarly, petitioner's use of a Party mail box which was restricted to Party members was direct evidence of the status of membership.

So also, payment of dues is an act directly and compellingly evincing membership and recognition of membership. There were two witnesses to such payments, petitioner's ex-wife and Miss Bentley. And petitioner's ex-wife made it clear in her testimony that this act of payment was deemed by her and by petitioner a method of evincing membership in the Party and establishing the status of membership (see Statement, *supra,* p. 20). Petitioner asks this Court to rule, as a matter of law (Pet. 44–45), that the only

type of payment which proves membership is that which is evidenced by pasting stamps in a dues book, despite testimony at the trial that such method was not used in the case of all members (Tr. 1087). As a matter of fact, so far from it being common knowledge, as petitioner claims, that Communist Party dues were paid only by the method he suggests, this Court presently has before it a record in which an alien, ordered deported for former membership in the Party, admitted payment of dues in substantially the manner in which it was proved dues were collected from petitioner. (See *Coleman* v. *McGrath,* No. 264, this Term, Transcript 39–40.)

We see no necessity for going further into the proof. It is clear that, quite aside from the principle that an appellate court will not direct the entry of a judgment of acquittal even where it finds a deficiency in the evidence (*Bryan* v. *United States,* 338 U. S. 552), there is no possible basis for such a direction here since, on any theory, the Government proved its case by more than the minimum quantum of evidence required to establish perjury.

Under these circumstances the questions raised by the petition as to the interpretation given to the perjury statute by the court below have no immediate significance. The authorities, cited by the court below, make it clear that perjury may

be established by proving that a witness made a material statement under oath which he did not believe to be true.[9] That is what the statute (18 U. S. C. 1621) in terms proscribes. It is also true, as petitioner argues, that most perjury cases have been tried on the theory that a witness' knowledge of the falsity of his oath can best be proved by proving that the facts to which he swore are untrue.[10] The difference is actually more of phraseology than reality, for evidence which is sufficiently compelling to show that a witness believed a statement to be false is the same kind of evidence which will normally prove its falsity. For example, in *People* v. *McKinney*, 3 Park Crim. Rep. (N. Y.) 510 (1857), the defendant had testified that he heard two others make a bargain. The terms of the bargain as he described them were true, but the defendant was not present when the bargain was made. Despite the fact that he could obviously have

[9] Hawkins, *Pleas of Crown* (6th edition, 1777), Bk. I, Ch. 69, Sec. 6, pp. 322–333; *Regina* v. *Schlesinger*, 10 Q. B. 670, 2 Cox, Cr. Cases 200 (1847); *State* v. *Gates*, 17 N. H. 373 (1845); *People* v. *McKinney*, 3 Park. Crim. Rep. (N. Y.) 510, 515 (1857); *State* v. *Cruikshank*, 6 Blackford (Ind.) 62 (1841); *Commonwealth* v. *Miles*, 140 Ky. 577 (1910).

[10] See in this connection the British codification of the common law in the Perjury Act of 1911 (1 & 2 George V, c. 6), in which perjury is defined as the making of a material statement under oath which the witness "knows to be false or does not believe to be true," (Sec. 1) and which requires that no conviction be had "upon the evidence of one witness as to the falsity of any statement alleged to be false" (Sec. 13).

been tried for making the false statement that he was at the particular place, the case was submitted to the jury on the theory that he should be convicted if he did not believe that to which he swore. The evidence that proved the falsity of part of his statement proved his lack of belief. So when a man testifies that an article is of a certain value, it is possible to show his lack of belief by showing that he had never examined the article or received information about it, *i. e.*, by his objective actions.

Here, as we have shown, on either theory, the evidence in this case is sufficient, and petitioner is not entitled to a direction for entry of a judgment of acquittal. In view of the fact that the Government if permitted to do so, intends to dismiss the present indictment, this Court would be acting merely in an advisory capacity if it undertook in this case an examination of the scope of the perjury statute and the perjury rule as applied to a witness' lack of belief in his sworn statement.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1951

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v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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